In the

# Supreme Court of the United States

October Term, 1955

No. 374

STATE OF WISCONSIN,

*Petitioner,*

*vs.*

UNITED STATES,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS


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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

The State of Wisconsin, the above named petitioner, by its attorneys, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Claims of the United States entered in the above case on April 3, 1956, and which became final on June 5, 1956, upon which day an order was entered overruling a timely and duly considered motion for rehearing and motion to alter and amend judgment filed April 30, 1956.

## OPINION BELOW

The opinion of the Court of Claims, which is as yet unreported, is appended to this petition.

## JURISDICTION

The judgment of the Court of Claims was entered April 3, 1956. A motion for rehearing and motion to alter and amend said judgment was overruled June 5, 1956. The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. § 1255 (1).

## STATUTES INVOLVED

The material portions of the statutes involved are as follows:

Act of July 1, 1944, 58 Stat. 649, 663:

> "SEC. 114 (b) The Court of Claims, on motion of either of the parties, or on its own motion, may summon any and all persons with legal capacity to be sued to appear as a party or parties in any suit or proceeding of any nature whatsoever pending in said court to assert and defend their interests, if any, in such suits or proceedings, within such period of time prior to judgment as the Court of Claims shall prescribe. * * * Upon failure so to appear, any and all claims or interests in claims of any such person against the United States, in respect of the subject matter of such suit or proceeding, shall forever be barred and the court shall have jurisdiction to enter judgment pro confesso upon any claim or contingent claim asserted on be-

half of the United States against any person who, having been duly served with summons, fails to respond thereto, to the same extent and with like effect as if such person had appeared and had admitted the truth of all allegations made on behalf of the United States. * * *"

Act of May 18, 1916, 39 Stat. 123, 157:

"That without bias or prejudice to the rights or interests of any party to the litigation now pending, the Secretary of the Interior be, and he hereby is, authorized to sell the timber on the so-called 'school lands' and 'swamp lands' within the boundaries of the Bad River and Lac du Flambeau Indian Reservations in Wisconsin, and to which the State of Wisconsin has asserted a claim; to keep a separate account of the proceeds of such sale with each legal subdivision of such land and to deposit the said proceeds at interest in a national bank, bonded for the safe-keeping of individual Indian moneys, to be paid over, together with the interest thereon, to the party or parties who shall finally be adjudged to be entitled to such fund: *Provided,* That the consent of the State or parties claiming title therefrom be obtained before any such sale shall be made."

## QUESTIONS

Where the United States, by statute and by treaty, respectively, conveyed identical swamp lands to the State of Wisconsin and to plaintiff Indian Bands;

and where valuable timber was cut from said lands and sold, and proceeds of sale were held by the United States in a separate account as provided by a statute requiring said funds to be held for payment, with interest, to the party adjudicated to be entitled to the same;

and where the doctrine of sovereign immunity from suit precluded the Indians and Wisconsin from suing the United States;

and where Congress passed an enabling act consenting to suit for damages by the Indians against the United States;

and where the Indian Bands commenced the present action;

and where, under *another* statute Wisconsin was notified by the Court of Claims of its right to intervene in this action as a party or forever be barred of all claims;

and where Wisconsin filed its petition to intervene in this action, and was accorded the status of a party, and presented evidence in support of its claim, but questioned the jurisdiction of said court to adjudicate its claim under said statute;

and where, following a full trial of all the issues, and the making of findings of fact and conclusions of law, wherein, among others, the court found, concluded and

held that *"the legal issues presented by * * * [Wisconsin] * * * have a basis in fact as well as law";*

and where the Court of Claims thereupon rendered judgment that defendant is liable to but one of the three plaintiff Indian Bands, and dismissed the intervening petition of Wisconsin "without prejudice";

and where the statute under which the court first assumed jurisdiction of Wisconsin's claim is subject to a time limitation within which actions may be brought thereunder, which time lapsed after Wisconsin filed its petition for intervention, but before dismissal of Wisconsin's claim "without prejudice",

**ON THE FOREGOING FACTS,**

(1) Is the Court of Claims authorized to refuse to determine whether it had jurisdiction of Wisconsin's claim?

(2) Is Wisconsin prejudiced by the refusal of the Court of Claims to determine whether it had jurisdiction of Wisconsin's claim?

## STATEMENT

In November, 1944, by a separate amended petition in a case pending in the Court of Claims under authority of the Jurisdictional Act of August 30, 1934, 49 Stat. 1049, the Lac du Flambeau, Lac Court Oreilles and Bad River Bands of Indians sought to recover against the United States damages for the value of land, and timber thereon, claimed by Wisconsin as swamp land under the Act of September 28, 1850, 9 Stat. 519, which swamp lands were located within their respective reservations in Wisconsin. Appendix A, Finding 1, p. 7. The complaint of the plaintiff bands claimed damages for breach of the provisions of Treaty of September 30, 1854, 10 Stat. 1109, creating their reservations, and ceding to them lands which included swamp lands, with valuable timber thereon, and which had been granted to Wisconsin under said Swamp Land Act of 1850. R. 5-16 Appendix A, Finding 3, p. 9.

The case (absent the State of Wisconsin) was heard and reported by a Commissioner of the Court, briefs and exceptions were filed, and the case was argued and submitted. Appendix A, Finding 1, pp. 7-8. The Court concluded that, since the alleged conflicting rights of Wisconsin were an important element in the plaintiff's case, the State should be notified of the proceeding, and advised of its right to intervene, pursuant to the Act of July 1, 1944, 58 Stat. 649, 663, 41 U. S. C. 114. Notice was given and Wisconsin filed a petition to intervene in which it asserted that it is the owner of the swamp lands in question and is entitled to the proceeds of timber cut from the lands. Appendix A, p. 2, Finding 4(c), p. 11. The petition denied the jurisdiction of the Court of Claims over the subject

matter of its claim and demanded judgment upon its claim, reserving the right to challenge the jurisdiction of the Court. Appendix A, Finding 4, p. 10. Upon denial by the Court of a motion by defendant to dismiss the State's petition under the statute of limitations, Wisconsin was accorded the status of a party in the case. Appendix A, Finding 1, p. 8.

Wisconsin took the position that, although the Court of Claims lacked jurisdiction to quiet title to the swamp lands in the State, if the Court determined that it had jurisdiction to adjudicate Wisconsin's demand for a money judgment, the State, as owner of the swamp lands in question under the grant of 1850, is entitled to recovery of the timber proceeds received therefrom by the United States, including funds received pursuant to the Act of May 18, 1916, 39 Stat. 123, 157. Appendix A, Finding 4(b) and (c), pp. 10-11; R. 382-390, 414-416

The case was heard by a Commissioner of the Court, the parties presented their evidence, and extensive findings were made by the Commissioner, based upon the evidence. R. 137-284, Appendix A, p. 2. Wisconsin (as well as plaintiffs and defendant) filed with the Court numerous exceptions to the Report and submitted its brief. R. 287-416 The Court of Claims adopted, without modification, the findings of fact contained in the Commissioner's report. R. 137-284 (Report of Findings 1-145); Appendix A, Findings 1-145, pp. 7-153. Among its findings of fact, the Court found: "The legal issues presented by the intervenor in its pleadings in this case have a basis in fact as well as law." Appendix A, Finding 141, p. 148.

The portions of the Court of Claims' opinion material to the issues presented in this petition are as follows (Appendix A, pp. 4 through 6):

> "The Government urges that none of the lands of the reservations passed to the State of Wisconsin by the Swamp Land Act of 1850. The Swamp Land Act of course only granted to the states land which was owned by the United States. The Government says that the land ceded by the Chippewa Nation to the United States by the Treaties of 1837 and 1842 did not become the property of the United States until it was vacated by the Indians; that the land included in the reservations never was vacated by the Indians; that they occupied it in 1850 when the Swamp Land Act was passed; that the Treaty of 1854 granting their reservations was, in effect, only a relinquishment of the power of the President, reserved in the earlier treaties, to require them to vacate the land and thus perfect the title of the United States.
>
> "We do not agree with the Government's analysis. As our findings show, the intention of the parties to the Treaties of 1837 and 1842 was that the United States was to have the title to the land, and the Indians were to have only a revocable license to use the land until the President required them to vacate it. We think the land was, in 1850, public land of the United States to which the Swamp Lands Act applied.
>
> "Since the Treaty of 1854, granting to the Indians their reservations, as, indeed, before that time, they have had complete and exclusive use of the reservation land, subject to the usual Government supervision of the cutting and marketing of timber. They have had the proceeds of the sale of timber, except that the sum of $119,450.50 plus accumulated interest, proceeds of the sale of timber from the Lac du Flambeau

reservation, is being held by the Government on interest, to await the determination of its ownership. What, then, are the Indians suing for, except for this sum of money? The theory of their suit seems to be that the Government sold them land in 1854 that it did not own, and should pay them for what it sold them but did not deliver to them. * * *

"* * *

"As we have said, the State of Wisconsin was notified by the court of the pendency of the suit of the Indians, and of its right to intervene in the suit, should it desire to do so. The reason for the notice was that it had become evident to the court that the conflicting grants were an important feature of the case. The State did file a petition, as an intervenor. In its petition the State denied the jurisdiction of this court over either the subject matter of the litigation, i.e., the title to the lands, or the state itself, in its sovereign capacity. However, because of the peril that it would run, if it failed to intervene, i.e., that a judgment that it had no rights in the land might be entered against it, it felt bound to intervene, reserving its rights to challenge our jurisdiction. It then asked for a judgment against the United States decreeing the title to the swamp lands in the reservations to be in the State of Wisconsin, and giving it a judgment against the United States for the proceeds of the timber cut and sold from those lands.

"Since the State denies our jurisdiction, and only intervenes and asks relief because of the peril that it might be mistaken as to the question of our jurisdiction, we will not, of course, consider its petition or its prayer for relief unless it is necessary to do so in order to decide the issues between the plaintiffs and the United States. We do not find it necessary to do

so, for reasons hereinafter stated, and will therefore dismiss the State's petition. Its participation in the trial has been helpful and instructive to the court.

"* * *

"As we have said, the Indians have had the possession and enjoyment of the reservation lands, and have received the proceeds of the timber cut from the lands, except that the sum of $119,450.50, the proceeds of timber cut from the Lac du Flambeau Reservation during a certain period, has been held by the United States at interest to await a determonation [sic] of the right to that money.

"The Lac du Flambeau Band is entitled to recover the proceeds of timber cut from their reservation, to the extent that such proceeds have not already been paid over to them, together with the interest which has accumulated upon such unpaid proceeds.

"The case is remanded to a commissioner of this court for a determination of the amount to which the Lac du Flambeau Band is entitled, in accordance with this opinion, and for a determination of the amount of offsets, if any, to which the United States may be entitled.

"As to the Lac Courte Oreilles Band and the Bad River or La Pointe Band, the petition is dismissed.

"The intervening petition of the State of Wisconsin is dismissed without prejudice."

Judgment was entered accordingly on April 3, 1956. A timely motion for rehearing and motion to alter and amend judgment, presenting the issues with which this petition is concerned, was overruled by the Court of Claims June 5, 1956. R. 791–895.

## REASONS FOR GRANTING THE WRIT

1. The Court of Claims, by its judgment dismissing ithout prejudice the intervening petition of the petitioner ere, the State of Wisconsin, thereby refusing to determine hether it had jurisdiction of the subject matter of the aim of the State of Wisconsin, although it had previously corded Wisconsin the status of a party to the case, taken idence of its claim and had the issues, including said ue as to its jurisdiction, presented by the parties in their eadings, proofs, briefs and argument before the Court, has so far departed from the accepted and usual course judicial proceedings as to call for an exercise of this urt's power of supervision.

2. By its judgment and order in the circumstances set th above, the Court of Claims has decided an important estion of federal law which has not been, but should settled by this Court.

Wherefore, your petitioner respectfully prays that a it of certiorari be issued.

STATE OF WISCONSIN,
*Petitioner,*

By

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*Attorney General,*

STEWART G. HONECK,
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tember, 1956

## ARGUMENT

### I. THE COURT OF CLAIMS ERRED IN REFUSING TO DETERMINE WHETHER IT HAD JURISDICTION OVER THE SUBJECT MATTER OF THE CLAIM OF THE STATE OF WISCONSIN.

That the dismissal of Wisconsin's petition to intervene was without prejudice to filing another suit does not make the judgment of the Court of Claims unreviewable here, for denial of relief and dismissal of its petition ended the case for Wisconsin, so far as the Court of Claims was concerned. Such judgment of dismissal has the requisite finality for purposes of review, in accordance with the settled rulings of this Court. *United States v. Wallace & Tiernan Co.* (1949), 336 U. S. 793, 795n., 69 S. Ct. 824, 93 L. Ed. 1042; *United States v. National City Lines* (1947), 334 U. S. 573, 577, 68 S. Ct. 1169, 92 L. Ed. 1584; *Wilson v. Republic Iron Co.* (1921), 257 U. S. 92, 96, 42 S. Ct. 35, 66 L. Ed. 144; *McAllister v. Ches. & Ohio Ry. Co.* (1916), 243 U. S. 302, 305, 37 S. Ct. 274, 61 L. Ed. 735; *Detroit &c Ry. v. Michigan R. R. Comm.* (1915), 240 U. S. 564, 570-571, 36 S. Ct. 424, 60 L. Ed. 802.

From the issues and pleadings in the case, Wisconsin was a necessary party and had an absolute right to intervene if the Court of Claims had jurisdiction of its claim. Plaintiffs alleged that Wisconsin had superior title to swamp lands within their reservations by virtue of the Swamp Land Act of September 28, 1850, 9 Stat. 519, resulting in breach of defendant's agreement by the Treaty of September 30, 1854, 10 Stat. 1109, under which plaintiffs were to receive title to their entire reservations. Plaintiffs demand

ed judgment for damages for value of the reservation swamp lands and timber thereon. Defendant contended that by virtue of the plaintiffs' rights of occupancy in the lands in question, the swamp lands were not public lands subject to the grant to Wisconsin under the Act of 1850, and therefore the plaintiffs' claim should be dismissed. Appendix A, p. 4, Finding 50, n. 11, p. 50.

It is patent that as incident to an award or denial of the damages claimed by plaintiffs under the issues presented, the Court was required to determine title to the swamp lands under the conflicting provisions of the statute and treaty. Wisconsin's participation in the case was imperative under the issues raised. The fact that no judgment rendered upon the question of title presented could, absent Wisconsin, be binding upon the State, should not furnish inducement to the Court to decide rights, which, because of the absence of Wisconsin, could have no finality. *Arizona v. California* (1936), 298 U. S. 558, 571-572.

In this posture of the case, the Court of Claims gave Wisconsin notice of its right to intervene, pursuant to the Act of July 1, 1944, 58 Stat. 649, 663, 41 U. S. C. 114. Petition by Wisconsin to intervene, denying the Court's jurisdiction and reserving the right to challenge the same, but asserting claim for swamp land timber proceeds, was duly filed. Defendant moved to dismiss Wisconsin's petition. In acting upon the motion, the Court filed its opinion stating (R. 136, 114 C. Cls. 71, 74): "We deny the Government's motion to dismiss Wisconsin's petition and accord to Wisconsin the status of a party in the case." Thereafter, all parties presented their evidence under the issues as drawn by their pleadings, the case was reported at length

by the Commissioner, exceptions were filed, briefs and argument presented to the Court and the cause submitted.

At this point in the case, the issue as to defendant's liability to each of the three plaintiff bands and to the State of Wisconsin, or to any of them, was ripe for decision on the merits. The Court had also been apprised, in brief and argument on behalf of Wisconsin, as to the serious question concerning the Court's jurisdiction over its claim. Appendix C; R. 382-390, Brief of Intervenor.

It is manifest that Wisconsin had at all times urged the Court of Claims to grant Wisconsin judgment on the merits of its claim for the swamp land timber proceeds received by the United States, if that Court had jurisdiction to render judgment on the merits, in view of the question as to the sovereign immunity of the United States. Wisconsin had not moved for nonsuit, nor consented to the dismissal of its claim without prejudice. In entering its judgment as to Wisconsin, the Court of Claims acted *sua sponte*, disregarding its duty to resolve the jurisdictional issue by judgment either that it had, or did not have, jurisdiction over the claim of the State.

Wisconsin is not concerned whether the Court of Claims decides that it did have jurisdiction of Wisconsin's claim or whether it did not have jurisdiction. The State would not be prejudiced if the Court held it did not have jurisdiction, because that would be the law of the case unless the defendant disagreed and sought to have the determination reversed in this Court. But if the Court determines that it did have jurisdiction, then Wisconsin is entitled to judgment on the merits.

No exercise of discretion by the Court of Claims was involved with respect to determination of the issue of jurisdiction. No effort was made to require the Court to decide the issue in a particular way, i.e., either in favor or against the exercise of jurisdiction. No delay would be occasioned in disposition of the claims of plaintiff Indian bands, such as might otherwise justify dismissal of the intervening petition, since the case had been fully presented and submitted by all parties, including Wisconsin. Defendant did not contend that the State was improperly joined as a party.

If the Court had jurisdiction over the claim of Wisconsin against the United States, the Court had a positive, affirmative duty to exercise that jurisdiction and to decide the merits of the claim. If the Court lacked jurisdiction of the claim of the State, the Court had a mandatory duty to render judgment that it was without jurisdiction of the claim of Wisconsin.

Certiorari is a proper remedy to confine inferior courts to the exercise of their prescribed jurisdiction or to compel them to exercise their authority when it is their duty to do so. *U. S. Alkali Assn. v. U. S.* (1945), 325 U. S. 196, 202-203, 65 S. Ct. 1120, 89 L. Ed. 1554. Unless the aggrieved party has a remedy by appeal, error or other review which is adequate, where a lower court without sufficient reason, neglects or refuses to act upon a matter within its jurisdiction, properly brought before it, mandamus will issue at the instance of the one entitled to invoke the remedy, to compel it to assume jurisdiction and proceed to a determination of the cause, or to correct any unauthorized attempt to divest itself of jurisdiction by dismissal. 35 Am.

Jur., *Mandamus*, § 254, pp. 25-26; 38 C. J. 610-611. Generally, a litigant whose action has been wrongfully dismissed by a court having no power to do so is entitled to a reinstatement of the cause, since such dismissal practically amounts to a refusal on the part of the Court to hear and determine the issues. 35 Am. Jur., *Mandamus*, § 282, p. 44.

The effect of the Court of Claims refusal to decide jurisdiction is to delay without cause the determination of that issue, and to require a multiplicty of actions by Wisconsin to resolve it. The hardship and expense thus imposed prejudice the rights of the State.

By its finding that the legal issues presented by Wisconsin have basis in fact and law and its dismissal without prejudice, the Court invites the State to bring a new action upon the same claim involving the same issues.

Despite the form of the judgment of the Court of Claims dismissing without prejudice Wisconsin's *petition to intervene*, the fact is that the petition to intervene by the State was by order of the Court allowed on July 11, 1949, and Wisconsin was accorded the status of a party in the case. R. 136, 114 C. Cls. 71, 74. Wisconsin was thereafter treated as a party and presented its evidence, briefs and argument to the Court. The State having become a proper party to the case, the Court had the duty to determine its claim upon the merits, unless foreclosed from acting by lack of jurisdiction. If permitting intervention by Wisconsin in the case under the facts here is discretionary, the Court exhausted its discretion by its order making the State a party, and was at minimum required to determine jurisdiction when final judgment was en-

tered. Even without formal order granting intervention, one who petitions to intervene and is thereafter treated as a party, will for purposes of appeal, be recognized as a party. *Myers v. Ferm* (1866), 72 U. S. (5 Wall.) 205, 207, 18 L. Ed. 49; *Bronson v. LaCrosse Railroad Co.* (1863), 69 U. S. (2 Wall.) 283, 301-303, 17 L. Ed. 725; *Harrison v. Nixon* (1835), 34 U. S. (9 Pet.) 483, 502, 505, 9 L. Ed. 201. Compare, *Ex Parte Cutting* (1876), 94 U. S. (4 Otto) 14, 21-22, 24 L. Ed. 49.

Intervention by Wisconsin was initially granted pursuant to the following material portions of Court of Claims' Rule 39 (c), then in effect:

> "(1) A summons under section 14 (b) of the Contract Settlement Act of 1944 may be issued by the court on its own motion or on motion of a party. * * *
>
> "* * *
>
> "(5) * * * If the third party files a petition or an answer, the court may order the issues between the plaintiff and the defendant and the third party, or between any or either of them, to be tried in such manner as the court may direct. As provided in section 14 (b) of said Act, the case as to such third party shall be treated as an independent proceeding which has been consolidated, for purposes of trial and determination, with the case with respect to which the summons or notice was issued. The court may order such proceedings to be taken, pleadings or documents to be delivered, or amendments to be made, as shall appear proper for having the rights and liabilities of the parties determined and enforced most conveniently and with as little embarrassment and delay to the original parties as the interests of justice may require.
>
> "* * *"

Under this rule, it is submitted that the issues of all parties, including Wisconsin, having been tried by the Court, the State is entitled to a determination of its rights. The effect of the judgment entered is to nonsuit Wisconsin without its consent notwithstanding it has made out a *prima facie* case and is entitled to a judgment on the merits.

## II. THE CLAIM OF THE STATE OF WISCONSIN IS PREJUDICED BY THE JUDGMENT OF THE COURT OF CLAIMS DISMISSING THE INTERVENING PETITION OF THE STATE "WITHOUT PREJUDICE."

Wisconsin's claim against the United States is based upon its right, by virtue of title granted the State by the Swamp Land Act of 1850, to the timber proceeds from swamp lands within plaintiffs' reservations, which proceeds were received by the United States in a trust capacity. The President and Congress have formally recognized that the rights of the plaintiff Indians in such timber proceeds should be determined as against the rights of the State of Wisconsin to the same proceeds.

Presidential Order of December 5, 1908, provides that swamp land timber proceeds received by the United States from the reservations be "* * * placed in escrow until it shall have been decided to whom the lands belong. * * *" and the Act of May 18, 1916, 39 Stat. 123, 157, provides that such timber proceeds "* * * be paid over, * * * with the interest * * *, to the party or parties who shall finally be adjudged to be entitled to such fund * * *." Appendix A, Findings 76 (b) and 81, pp. 81-82, 86.

Without specific authority from the President or Congress to release *swamp land* timber proceeds, some of the timber proceeds received by the United States were paid to Indians of the plaintiff bands. Appendix A, Findings 77, 78, 91, 137 (e), 139, pp. 82-85, 100-101, 144, 145-147.

In its opinion, the Court of Claims states that the plaintiff Indians have received the swamp land timber proceeds, except the sum of $119,450.50, from Lac du Flambeau reservation, which is held by the United States at interest to await a determination of the right to that money. It further states that the Lac du Flambeau band is entitled to recover the timber proceeds from their reservation, *to the extent that such proceeds have not already been paid over to them,* together with interest accumulated upon such unpaid proceeds, and remands the case to a commissioner for determination of the amount to which the band is entitled, less offsets, if any. Appendix A, p. 6.

The clear implication from the Court's words is that the Lac du Flambeau band is entitled, not only to funds already paid, contrary to law (as argued by Wisconsin), but to the specific fund now held by the United States, which the President and Congress have directed to be held for the owner thereof! This, despite the Court's opinion that "* * * We think the [reservation swamp] land was, in 1850, public land of the United States to which the Swamp Lands Act applied." Appendix A, p. 4. No mention is made in the opinion proper as to the existence or effect of the action of the President in 1908 and of Congress in 1916. If, as the Court seems to hold, the Lac du Flambeau band did not acquire title to swamp lands within its reservation under the Treaty of September 30, 1854, 10 Stat.

1109, such public lands having inured to Wisconsin under the Swamp Land Act of 1850, then this band is not entitled to any part of the fund held by the United States, or interest thereon.

Its petition for intervention having been dismissed "without prejudice," Wisconsin is without standing to protect its direct and immediate interest in the timber funds from the practical result here of distribution to the Indians of these unpaid proceeds. Such impending result effectively prejudices the claim of Wisconsin in the case, and prejudices its claim for these same proceeds if a new action is commenced by the State.

Even if the Court of Claims determines that it had no jurisdiction of Wisconsin's claim, and dismisses it for want of such jurisdiction, such result would have the effect of demonstrating to the Department of Justice and the Department of Interior these truths:

(1) The present judgment of the Court of Claims awarding the $119,450.50 damages would not be *res adjudicata* as to Wisconsin's claim to the specific fund which is being held pursuant to the 1916 Act.

(2) Wisconsin would still be free to seek a special jurisdictional act to permit it to sue the United States and thus obtain a determination of the merits of its claims.

Certiorari is an apt remedy where a federal court abandons its jurisdiction already properly obtained. *McClellan v. Carland* (1910), 217 U. S. 268, 30 S. Ct. 501,

54 L. Ed. 762. One whose interest in a particular fund involved in litigation is affected, should be permitted to intervene in order that the respective rights of the parties upon the fund may be ascertained and determined. *French v. Gapen* (1881), 105 U. S. (15 Otto.) 509, 525-526, 26 L. Ed. 951.

It should be noted that the fact that the plaintiffs remain in possession of the reservation swamp lands is attributable solely to the neglect of the Secretary of the Interior to ever identify such lands as swamp and to transmit a list thereof to the Governor of Wisconsin as required by the Swamp Land Act of September 28, 1850. Appendix A, Finding 121, pp. 129-130. It would be unconscionable for Wisconsin to be deprived of timber proceeds received by the United States by reason of the dereliction of duty of the Secretary of the Interior. The rights of the State could not be prejudiced or embarrassed by such failure. *Wright v. Roseberry* (1887), 121 U. S. 488, 501, 7 S. Ct. 985, 30 L. Ed. 1039; *Railroad Company v. Smith* (1869), 76 U. S. (9 Wall.) 95, 99-100, 19 L. Ed. 599; *Menominee Tribe v. U. S.* (1941), 95 C. Cls. 232, 243.

The claim of Wisconsin is prejudiced further by reason of the six-year statute of limitations applicable to every claim of which the Court of Claims has jurisdiction. 28 U. S. C. § 2501. After Wisconsin was notified by the Court of its right to intervene pursuant to the Act of July , 1944, 58 Stat. 649, 663 (referred to herein as the War Contract Settlement Act of 1944), in February, 1949, the State filed its petition to intervene, was made a party and fully participated in the action. Judgment by the Court dismissing Wisconsin's petition to intervene without preju-

dice leaves the State in the same position as though it had instituted no action on its claim.

Assuming that the Court of Claims acquired jurisdiction of Wisconsin's claim in the instant case under the War Contract Settlement Act of 1944, if the judgment of dismissal without prejudice is permitted to stand and Wisconsin brings a new action in 1956, twelve years having passed since the effective date of the War Contract Settlement Act of 1944, Wisconsin's claim in the subsequent action is vulnerable to a motion by the United States to dismiss upon the ground that the claim is barred by the statute of limitations, although such motion could not have success in the instant action. Thus, prejudice is the consequence of the Court's dismissal of Wisconsin's claim "without prejudice."

If the Court of Claims, under any statute, has jurisdiction of the claim of the State, Wisconsin is entitled to judgment on the merits. That Wisconsin has in good faith invited the Court's attention to the infirmity of its jurisdiction furnishes no more basis for refusal to decide this issue than Wisconsin's consent to have the Court of Claims take jurisdiction would warrant assumption of jurisdiction by the Court, if it had none. If a court lacks jurisdiction, no consent or stipulation by the parties can remedy the defect. 14 Am. Jur., *Courts*, § 184. Any judgment, except one of dismissal for lack of jurisdiction, would be void.

## CONCLUSION

The petition should be granted.

Respectfully submitted,

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